TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~336~~ 129

JOHN R. LIONBERGER, PLAINTIFF IN ERROR,

vs.

EDWARD S. ROWSE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED DECEMBER 8, 1868.

SUPREME COURT OF THE UNITED STATES.

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A The United States of America to Edward S. Rowse, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the districts of Missouri, wherein John R. Lionberger is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable James Baker, p. judge of the Supreme Court of Missouri pro tem., this 20th day of November, in the year of our Lord one hundred and sixty-eight.

JAMES BAKER, *Judge.*

I accept service of the within citation this 20 Nov'r, 1868.

EDWARD S. ROWSE, *Defendant.*
By H. CLOVER, *his Att'y.*

B UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the Supreme Court of the State of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you at the October term thereof, A. D. 1868, between John R. Lionberger, as plaintiff, and against Edward S. Rowse, defendant in error, a manifest error hath happened to the great damage of the said John R. Lionberger, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this eighteenth of November, in the year of our Lord one thousand eight hundred and sixty-eight.

Issued at office in the city of St. Louis with the seal of the Circuit Court of the United States for the district of Missouri, dated as aforesaid.

[SEAL.] BEN. F. HICKMAN,
Clerk C. C. U. S. Missouri Districts.

Allowed by—

REC. 336—1 JAMES BAKER, *Judge.*

STATE OF MISSOURI, *ss*:

I, O. T. Fishback, clerk of the Supreme Court, held at St. Louis, of the State of Missouri, in obedience to the mandate of the within writ, herewith transmit to the honorable Supreme Court of the United States held at Washington city a full, true and complete transcript of the record and proceedings in the within-entitled cause, as fully as the same remain of record and on file in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office in the city of St. Louis, this third day of December, A. D. 1868.

[SEAL.] O. T. FISHBACK, *Clerk*,
Per E. P. M. CARTY, *Dp.*

1 STATE OF MISSOURI, *ss*:

Be it remembered that heretofore, to wit, on the n inth day of September, A. D. 1868, there was filed in the office of the clerk of the Supreme Court, held at St. Louis, of the State of Missouri, a transcript of the record and proceedings in a certain cause lately pending in the St. Louis Circuit Court, wherein John R. Lionberger was plaintiff and Edward S. Rowse was defendant, which transcript was in the words and figures following, to wit:

2 UNITED STATES OF AMERICA, *ss*:

The State of Missouri to the judges of the eighth judicial circuit in said State, greeting:

Whereas in the record and proceedings in a certain cause lately pending in the St. Louis Circuit Court wherein John R. Lionberger was plaintiff, and Edward S. Rowse was defendant, in a civil action, manifest error has intervened to the great damage of said plaintiff, as by his complaint we are informed:

Now, being willing that error, if any there be, should be corrected and full and speedy justice done to the parties aforesaid in that behalf command you that you send to us, certified under your seal, the record and proceedings in the cause aforesaid, as fully as the sume remain of record before you in said court, so that we may have them before us at our Supreme Court to be begun and held in the city of St. Louis, in the county of St. Louis, in said State, on the third Monday in October next, so that our judges of our Supreme Court, on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done.

Witness O. T. Fiskback, clerk of said Supreme Court, at office in the city of St. Louis, the sixth day of July, in the year of our Lord one thousand eight hundred and sixty-eight.

[SEAL.] O. T. FISHBACK, *Clerk.*
Per E. P. McCARTY, *Dp.*

3 STATE OF MISSOURI, *County of St. Louis, ss·*

I, John Lewis, clerk of the Circuit Court within and for the county aforesaid, in obedience to the mandate of the within writ, herewith transmit to the honorable Supreme Court of the State of Missouri, held at St. Louis, a full, true and complete transcript of the record and proceedings in the within entitled cause as fully as the same remain of record and on file in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office in the city of St. Louis, this seventh day of July, 1868.

[SEAL.] JNO. LEWIS, *Clerk.*

4 STATE OF MISSOURI, *County of St. Louis, ss:*

Be it remembered that heretofore, to wit, on the twentieth day of September, in the year eighteen hundred and sixty-seven, there was filed in the office of the clerk of the Circuit Court of St. Louis county, a petition in the words and figures following, to wit:

In St. Louis Circuit Court, October term, A. D. 1867.

Petition.

JOHN R. LIONBERGER, plaintiff,
vs.
EDWARD S. ROWSE, defendant.

ST. LOUIS COUNTY, *ss:*

John R. Lionberger, plaintiff, states that heretofore, to wit, on the 14 day of September, 1867, and at the city and county of St. Louis, Missouri, the defendant, Edward S. Rowse did unlawfully and wrongfully seize and take from the possession of the said plaintiff and carry away certain property of s'd pl'ff, to wit, various bank notes of the denomination of five, ten, and twenty dollar notes, contained in a package, all the property of said plaintiff, and all of the value of three hundred dollars, by which wrongful and unlawful acts of the said defendant the said plaintiff has been damaged in the sum
5 of five hundred dollars, for which he asks judgment.

SHARP & BROADHEAD,
Atty's for Pl'ff.

And thereupon a summons issued from the office of said clerk in tenor and form following, to wit;

Sum's.

COUNTY OF ST. LOUIS, *ss:*

The State of Missouri to the sheriff of St. Louis county, greeting:

We command you to summon Edward S. Rowse to appear before the judge of our Circuit Court on the first day of the next term

thereof, to be held in the city of St. Louis, within and for the county of St. Louis, on the first Monday of October next, then and there to answer the complaint of John R. Lionberger, as set forth in the annexed petition, and have you then and there this writ.

Witness Frank A. H. Schneider, clerk of our said court, with the seal thereof hereto affixed, at office in the city of St. Louis, this 20 day of Sept'r, in the year of our Lord eighteen hundred and sixty-seven.

6 [SEAL.] FRANK A. H. SCHNEIDER, *Clerk.*

Sheriff's return.

Upon which summons the said sheriff made return as follows, to wit: "Executed this writ in the county of St. Louis, on the 20th day of September, 1867, by delivering to Edward S. Rowse, a copy of the writ and petition as furnished by the clerk.

JOHN McNIEL, *Sh'ff.*
By JAS. OWENS, *Dep'y.*

And afterwards, to wit, on the 8th day of October, A. D. 1867, the defendant filed his answer to the petition aforesaid, in the words and figures following, to wit:

Answer.

JOHN R. LIONBERGER, plaintiff,
v.
EDWARD S. ROWSE, defendant.

Defendant admits that he seized and took from the possession of the plaintiff goods and chattels mentioned in the petition, and of the value of two hundred and ninety-nine dollars and twenty cents as therein stated, but he says that the plaintiff ought not to have or maintain his aforesaid action thereof as to the said property as against the said defendant, because he, at the time stated in the pe-
7 tition, was and still is collector of the State and county revenue for the county of St. Louis, whose duty it was and is to receive and collect the taxes due and payable by the persons and tax payers of said county, and that before the time stated in plaintiff's petition there was regularly and lawfully assessed against the plaintiff, who then was and still is a citizen of St. Louis county, resident therein, a tax, being a tax upon seventeen thousand dollars of stock, held and owned by the plaintiff, in the bank, in the city of St. Louis, known and designated as the Third National Bank of St. Louis, and which bank was and is an incorporation, organized and acting under the provisions of the act of Congress of the United States, being the act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof, approved June 3d, 1864, and which tax bill was for the sum of two hundred and seventy-two dollars, and the plaintiff was then and there liable for the payment of the said tax.

8 And afterwards, to wit, on the day and year aforesaid, the said tax bill was, according to law, placed in the hands of this defendant as collector as aforesaid for collection, and the defendant alleges that he did in all respects comply with the provision and requirements of the act of the State for the assessment and collection of the revenue in the matter of the collection of the taxes due and collectable under said act, but the defendant did at all times neglect and fail to pay to the defendant the tax so as aforesaid assessed against him.

Whereupon the defendant under the authority of the aforesaid tax bills so as aforesaid placed in his hands for collection, and acting as collector as aforesaid, did then and there proceed to collect the amount of said tax in the manner as provided by law, together with an additional tax upon said bill of ten per cent. as permitted and required by law, and to that end he did, having first demanded payment of the said tax of the said defendant, but which he, plaintiff, then and there refused to pay, seize and take the aforesaid goods, chattels and property of the plaintiff mentioned in the peti-
9 tion, as was lawful for this defendant to do, and which is the alleged trespass mentioned in the petition. And as to the other eighty cents, parcel of the property mentioned in the petition, the defendant says he is not guilty of the alleged trespasses charged, and did not take or seize the same as charged, and he submits to the court that he is entitled to judgment upon his answer.

H. A. CLOVER, *Att'y.*

And afterwards the plaintiff filed her reply to said answer in the words and figures following, to wit:

In the St. Louis Circuit Court, October term, 1867.

Reply.

JOHN R. LIONBERGER, pl'ff,
v.
EDWARD S. ROWSE, def't.

The above-named plaintiff, for his reply to the new matter set up by defendant in his answer, says that he admits that defendant was collector of the State and county revenue for the county of St. Louis, and duly appointed and qualified as such; but plaintiff denies that there was regularly and lawfully assessed against him a tax
10 on seventeen thousand dollars of stock held by him in the Third National Bank of St. Louis, which said bank was organized under the provision of the act of Congress on the 25th of December, 1863, and he says he was the owner of two hundred shares of stock in the said bank, and that the said assessment was made against him as an individual stockholder, and not against the corporation; and further, that said assessment was made, and the amount of the said tax fixed by the officers having charge of the assessment

of taxes for St. Louis county, upon a valuation of said shares of stock so held and owned by said plaintiff; and further, that the said officers upon said assessed valuation of said stock, levied a tax thereon of ninety hundredths per cent. for State purposes, forty hundredths per cent. for county purposes, and forty hundredths per cent. for school purposes, which is the same tax referred to by defendant in his answer, and amounts to the sum of two hundred and seventy-two dollars, which said assessment and levy was made under color of law but without any legal authority whatever. And plaintiff further says that a bill for said tax so illegally assessed and
11 levied, was regularly placed in the hands of said defendant for collection, and that defendant under color of law, but without any legal authority whatever, did under the pretended authority of said tax bill, proceed to seize and did seize the goods and chattels of plaintiff, mentioned in said petition; wherefore plaintiff prays for damages, as in his original petition demanded.

SHARP & BROADHEAD,
Att'ys for Pl'ff.

And afterwards, to wit, on the 17th day of February, 1868, the defendant filed a demurrer to the reply of plaintiff in the words and figures following, to wit:

St. Louis Circuit Court, February term, 1868.

Dem. to reply.

JOHN R. LIONBERGER
v.
EDWARD S. ROWSE.

The defendant demurs to the reply of the plaintiff, and says that the same doth not set forth facts sufficient to constitute a cause of action against this defendant, or show matters whereby the plaintiff can have and maintain his aforesaid action against this defendant, or make any sufficient answer to the matter pleaded by this
12 defendant in his said answer to the cause of action stated in plaintiff's petition; wherefore by reasons of the insufficiency of the said reply in this behalf, the said defendant prays judgment if the said plaintiff ought to maintain the said action.

H. A. CLOVER, *For Def't.*

And afterwards, to wit, at the February term of said court, for the year 1868, and in general term, the following proceedings were had in said cause, to wit:

Dem. to reply sust'd.

JOHN R. LIONBERGER
EDWARD S. ROWSE.

MARCH 28, 1868.

The demurrer to the reply being submitted to the court, and the court being fully advised of and concerning the premises, doth order that the same be sustained at the costs of the plaintiff, and that execution issue therefor.

And afterwards, to wit, on the seventh day of May, 1868, an amended petition and a demurrer thereto were filed in said cause in the words and figures following, to wit :

In the St. Louis Circuit Court, April term, 1868.

Amended petition.

JOHN R. LIONBERGER, pl'ff,
v.
EDWARD S. ROWSE, def't.

13 The above-named plaintiff, John R. Lionberger, for this his amended petition, filed by leave of court, says that on the 14th day of September, 1867, he was the owner of two hundred shares of stock in the Third National Bank of St. Louis, a corporation duly incorporated under the provisions of the act of Congress of the United States, entitled "An act to provide a national currency, secured by a pledge of the United States stock, and to provide for the circulation thereof," approved Feb'y 25, 1863, which said two hundred shares of stock was of the value of twenty thousand dollars; that at the date last aforesaid the said defendant was collector of the State and county revenue for the county of St. Louis; that at that time plaintiff was a citizen of Missouri, and a resident of the county of St. Louis; that said Third National Bank was duly organized under the provisions of the act of Congress aforesaid, on the 25th of December, 1863. Plaintiff further says that prior to the said 14th day of September, 1867, the officer having charge of the assessment
14 of State and county taxes for the county of St. Louis aforesaid, had assessed against him as an individual stockholder of said Third National Bank of St. Louis, a tax of five hundred dollars for State and county taxes, that said assessment was made, and the amount of tax fixed by the officers having charge of the assessment of taxes for St. Louis county, upon a valuation of said shares of stock so owned and held by the said plaintiff; and that upon said assessed valuation of said stock the officer aforesaid levied a tax thereon of ninety hundredths per cent. for State purposes, forty hundredths per cent. for county purposes and forty hundredths per cent. for school pur-

poses, which said assessment was made under color of law, but without any legal authority whatever.

Plaintiff further says, that at the time of the organization of said Third National Bank of St. Louis, under the act of Congress aforesaid, and at the time of the levy and assessment of said tax, certain State banks organized under the provisions of the general banking
15 law of the State of Missouri, then in force, were in full operation as banks of discount and deposit.

Plaintiff further says, that a tax bill for the above-named tax so illegally assessed against the said plaintiff was, prior to the said fourteenth day of September, 1867, made out by the proper officers in pursuance of said assessment, and regularly placed in the hands of said defendant for collection, the said defendant being at the time duly appointed and qualified as collector of State and county taxes for the county of St. Louis, and that defendant on the said 14th day of September, 1867, did under color of law but without any legal authority whatever, but under the pretended authority of said tax bill, the plaintiff having refused to pay said tax, proceeded to seize and did seize certain goods and chattels of the plaintiff, to wit, a certain package of bank notes of the value of five hundred dollars, and unlawfully and wrongfully took them from the possession of
16 the said plaintiff, and carried the same away, by which said wrongful and unlawful act of the said defendant, plaintiff says he has been damaged in the sum of one thousand dollars, for which he asks judgment.

SHARP & BROADHEAD,
Att'ys for Pl'ff.

St. Louis Circuit Court.

Dem. to amended petition.

JOHN R. LIONBERGER, plaintiff,
EDWARD S. ROWSE, defendant.

The defendant, by H. A. Clover his att'y, comes and demurs to the petition of the plaintiff, and says that the same doth not set forth facts sufficient to constitute a cause of action against this defendant, and for special statement says, that the facts in the petition stated do not show any legal liability on the part of the defendant or any right on the part of the plaintiff to have or maintain his aforesaid action thereof against the defendant, but on the contrary thereof the petition and facts, as stated, show a complete and perfect right and authority on the part of this defendant to do the act complained of as a trespass in the petition, wherefore the defendant prays judg-
17 ment whether he, this defendant, ought to be required to make any other or further defence to the plaintiff's petition, and demands judgment herein.

By H. A. CLOVER, *Att'y.*

And afterwards, to wit, on the 20th day of May, 1868, the demurrer to the amended petition in said cause, was continued by the court in general term.

And afterwards, to wit, at the June term of said court for the year eighteen hundred and sixty-eight, in general term, the following further proceedings were had in said cause, to wit:

Demurrer sustained and judg't for def't.

JOHN R. LIONBERGER
EDWARD S. ROWSE.

JUNE 27, 1868.

The demurrer to the amended petition being submitted to the court, and the court being fully advised of and concerning the premises, doth order that the same be sustained.

Whereupon the plaintiff, declining to amend, it is, on motion
18 of the defendant by attorney, ordered by the court that final judgment be entered herein for the defendant on demurrer. It is therefore considered by the court that the plaintiff take nothing by his suit in this behalf; but that the defendant go hence without day and recover of the plaintiff his costs and charges in this behalf expended, and have execution therefore.

Certificate.

STATE OF MISSOURI, *County of St. Louis, ss:*

I, John Lewis, clerk of the Circuit Court of St. Louis county, certify the foregoing to be a true and complete transcript of the record and proceedings of said court in the case of John R. Lionberger vs. Edward S. Rowse, as fully as the same remain of record and on file in my office.

In witness whereof I hereto set my hand and affix the seal of said court, at office, in St. Louis, July seventh, 1868.

[SEAL.] JNO. LEWIS, *Clerk.*

And afterwards, to wit, at the October term, A. D. 1868, of the said Supreme Court, the following further proceedings were
19 had in said cause, to wit:

Assignment of error filed.

JOHN R. LIONBERGER, plaintiff in error,
v. } 47.
EDWARD S. ROWSE, defendant in error.

MONDAY, *October 26th*, 1868.

And afterwards, to wit, at the same term of said Supreme Court the following further proceedings were had, to wit:

Argument progressed.

JOHN R. LIONBERGER, plaintiff in error,
v.
EDWARD S. ROWSE, defendant in error.

THURSDAY, *October* 29*th*, 1868.

Now again came the parties aforesaid, by their respective attorneys, whereupon the argument of this cause progresses, and not being finished, the same is laid over till 10 o'clock to-morrow morning. Plaintiff's statement filed.

And afterwards at the same term of said court the following proceedings were had in said cause, to wit:

20 *Submission.*

JOHN R. LIONBERGER, plaintiff in error,
v.
EDWARD S. ROWSE, defendant in error. } 47.

FRIDAY, *October* 30*th*, 1868.

Now again come the parties aforesaid, by their respective attorneys, whereupon the argument of this cause progresses, and being finished, the cause is submitted to the court upon their briefs filed herein. Points and argument of defendant in error filed.

And afterwards, to wit, at the same term of said court the following further proceedings were had in said cause, to wit:

Error to St. Louis Circuit Court.

Judg't of affirmance.

JOHN R. LIONBERGER, plaintiff in error,
v.
EDWARD S. ROWSE, defendant in error. } 47.

MONDAY, *November* 16*th*, 1868.

Now again come the parties aforesaid, by their respective attorneys, and the court being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment rendered herein by the said St. Louis Circuit Court be in all things affirmed, and stand in full force and effect, and that the said defendant recover of the said plaintiff in error his costs and charges herein ex-
21 pended and have execu t herefor.
Opinion filed.

And afterwards, upon the twenty-first day of November, A. D. 1868, a bond was filed in said cause, which bond is in the words and figures following, to wit:

Bond.

Know all men by these presents, that we, John R. Lionberger as principal, and James H. Britton, as his security, are held and firmly bound unto Edward S. Rowse in the full and just sum of five hundred dollars, to be paid to the said Edward S. Rowse, his heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 21st day of November, in the year of our Lord one thousand eight hundred and sixty-eight.

Whereas lately at the October term, 1868, of the Supreme Court of the State of Missouri in a suit depending in said court, between John R. Lionberger as plaintiff, and against Edward S. Rowse defendant, judgment was rendered against the said John R. Lionberger,
22 and the said John R. Lionberger having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Edward S. Rowse, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now the citation of the above obligation is such, that if the said John R. Lionberger shall prosecute said writ to effect, and answer all damages and costs if he fails to make good his plea, then the above obligation is to be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

[SEAL] JOHN R. LIONBERGER,
[SEAL] JAMES H. BRITTON.

Approved by—

JAMES BAKER, *Judge.*

23 STATE OF MISSOURI, *ss:*

I, O. T. Fishback, clerk of the Supreme Court held at St. Louis, of the State of Missouri, certify the above and foregoing to be a full, true and complete copy of the record and proceedings in the above-entitled cause, as fully as the same remain of record and on file in my office.

Witness my hand with the seal of said court hereto affixed, at office, in the city of St. Louis, this third day of December, A. D. 1868.

[SEAL.] O. T. FISHBACK, *Clerk.*
Per E. P. McCARTY, *D'p.*

Supreme Court of the United States.

JOHN R. LIONBERGER, PLAINTIFF IN ERROR,

vs.

EDWARD S. ROWSE.

In error to the Supreme Court of the State of Missouri.

Statement of the Case.

The plaintiff in error was a stockholder in the Third National Bank of St. Louis, incorporated on the 25th day of December, 1863, under the provisions of the act of Congress, entitled "An act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation thereof," approved February 25th, 1863.

Upon the stock owned by him in the said bank, a tax was assessed by the authorities of Missouri for State, county and school purposes, for the collection of which the collector of taxes in the county of St. Louis seized the property of the plaintiff in error.

For this seizure the plaintiff in error brought suit against the collector, in the nature of an action of trespass. In his petition he avers that at the time of the organization of said Third National Bank of St. Louis under the act of Congress aforesaid, and at the time of the levy and assessment of said tax, certain State banks organized under the provisions of the general banking law of the State of Missouri, then in force, were in full operation as banks of discount and deposit.

The defendant demurred to the petition. The demurrer was sustained in the St. Louis Circuit Court, the judgment

of which was affirmed by the Supreme Court of the State of Missouri; whereupon the plaintiff in error brought the case to this Court.

The question is, whether the seizure by the collector was lawful; and that depends upon the construction to be given to the proviso to the 41st section of the Act of Congress of June 3, 1864, of the same title as that above mentioned, taken in connection with the provisions of law existing in Missouri on the subject of the taxation of banks.

The proviso is in the following words:

"That nothing in this act shall be construed to prevent all the shares in any of the said associations held by any person or body corporate, from being included in the valuation of personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such a bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.

"*Provided further*, That the tax so imposed, under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located."

The only banks in Missouri organized under the authority of that State, existing at the time of the asssessment of the tax aforesaid, and the seizure of the plaintiff's property for the payment thereof, were banks established under the general banking law of that State of 1857, entitled "An act to regulate banks and banking institutions, and create the office of bank commissioner."

This act was passed in pursuance of an amendment of the Constitution of the State of Missouri, adopted at the same session at which said act was passed, and which is in the following words:

"ARTICLE VIII.

"The General Assembly shall have power to establish such bank or banks as may be deemed necessary for

the interests of the State, but any bank so established shall be based upon a specie capital, and made liable to redeem *its issues* in gold or silver: *Provided*, that the number of banks chartered shall never exceed ten, and the aggregate amount of capital shall never exceed twenty millions of dollars."

It will be seen from this amendment, that the Constitution of the State of Missouri, considered nothing to be banks in the proper acceptation of the term, except those which had the power to issue circulating notes.

The first section of that general banking law is as follows:

§. 1. "Every bank which now is or shall hereafter be incorporated under the authority of the State, shall be subject to the liabilities and governed by the rules contained in this act."

The 32d section of the same act, is in the following terms.

"In consideration of the privileges granted by this act to banks incorporated in this State, each banking company agrees to pay the State, annually, *one per cent* on the amount of capital stock paid by the stockholders, other than the State, which shall be in full of all bonus, and other taxes, to be paid to the State by the respective banks."

On the 18th of March, 1861, the Legislature of Missouri passed an act amendatory of the act of 1857, in which it was provided as follows:

"That the one per cent. required to be paid by the 32d section of Art. 1, of said act, (Banking Act,) *shall be received as full compensation for all taxes of every kind whatever;* and it shall not be lawful for any county, city or town corporation to levy or collect any tax of any kind upon or from any banks organized under said law."

From these sections of those two acts, it appears that no bank authorized by the general banking law of Missouri was subject to taxation; that each of them paid to the State annually one per cent. on the amount of its capital stock,

which was declared to be in full of all bonus and other taxes to be paid to the State by said bank.

The effect of these two sections is claimed to be a contract between the State and the banks, debarring the State, or any county, city or town from levying any tax whatever upon any of those banks.

The plaintiff in error claims that the State being so debarred against taxation of banks created by its own authority, cannot levy any tax upon any national bank, or upon shares of stock held by any individual in any such bank. This is the question to be decided by this court.

Upon it the plaintiff in error submits the following

POINTS AND AUTHORITIES.

The main points necessary to sustain the case of the plaintiff in error seem to me to have been already decided by this court.

1. In the Home of the Friendless *vs.* Rowse, decided at the present term of this court, it was held that the State of Missouri might debar itself from the exercise of the right of taxation, by declaring in the charter of a corporation that all property of said corporation should be exempt from taxation. The doctrine in that case conclusively establishes the right of the Legislature of the State of Missouri in its general banking law to declare any exemption from taxation it might please to grant to the banks established under that law, and an exemption so granted in the charter was held by this court to be irrepealable by any subsequent legislative act, or by any subsequent constitutional provision of that State.

2. In Gordon vs. The Appeal Tax Court, 3 Howard, 133, it was held by this court that the State of Maryland having in the charter of certain banks declared that, upon their complying with the conditions of the act under which they were chartered, the faith of the State was pledged not to impose any further tax or bonus on said banks during the

continuance of their charters, the State could not tax the shares of the stockholders in those banks.

These two points being settled by the decisions of this court, seem to me to close the case.

The proviso to the 41st section of the national banking law of 1864, restricts the right of State taxation to the limit of its taxation upon the shares of any of the banks created by the State.

The terms of that proviso make it a necessity to examine the State constitution and laws, in order to determine the fact, whether under them the shares in banks created by such State are taxed, and if so, to what extent.

If the State taxes the shares of a bank created by itself, it can impose an equal or less tax, but no greater, upon the shares of a national bank.

If the State imposes no tax upon the shares of a bank of its own creation, it can impose none upon those of a national bank.

If the State is any way precluded or estopped from taxing the shares of a bank created by itself, it is precluded and estopped from taxing those of national banks.

It is no answer to these propositions to say that in the statutes of Missouri of 1864, is found a provision that shares of stock in banks and other incorporated companies shall be subject to assessment for taxation as other property.

That provision cannot annul and set aside a pre-existing contract between the State and a bank against taxation. It is a provision which existed in the laws of Missouri prior to the passage of the general banking law, and the provisions of the general banking law necessarily supercede it as to the banks created under that law.

Nor can it be considered any answer to these propositions that in the State of Missouri, there exist corporate institutions established under the authority of the State with the powers which might appertain to a bank of discount and deposit. The national banking law is to be

considered, when speaking of banks as established by States, as referring to banks similar to those established by the United States; and the provision of the Missouri Constitution above quoted, clearly indicates that banks in Missouri were institutions recognized by the Constitution as having the powers not only of banks of discount and deposit, but of circulation also.

Nor is it yet further, any answer to these propositions to say that the proviso to the 41st section of the National Banking Law was intended merely as a limit of the rate of taxation which the State might impose, and that anywhere within the range of that limit the State was authorized to levy a tax. The true construction of it is, that if the State could consistently with its own constitution and laws tax banks of its own creation, it might tax National Banks also to the extent to which it taxed its own banks. But this would leave the question still open, whether the State could tax its own banks at all. If it could not tax its own banks at all, it could not tax the National Banks. Else, if it taxed the National Banks at all, to ever so small an amount, it would be taxing them a greater rate than it taxed its own banks.

C. D. DRAKE,
Attorney for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

JOHN R. LIONBERGER,

Plaintiff in Error,

vs.

EDWARD S. ROWSE,

Defendant in Error.

ERROR TO THE SUPREME COURT OF MISSOURI.

BRIEF OF JAS. O. BROADHEAD.

FOR PLAINTIFF IN ERROR.

ST. LOUIS:
GEORGE KNAPP & CO., PRINTERS AND BINDERS.
1870.

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IN THE

SUPREME COURT OF THE UNITED STATES.

December Term, 1869.

JOHN R. LIONBERGER,
Plaintiff in Error,
vs.
EDWARD S. ROWSE,
Defendant in Error.

This case involves the question of the validity of the tax imposed by the State of Missouri on the shares of stock in National Banks located in Missouri, under the existing laws of that State. The case is a representative one; the stockholders having in most instances refused to pay the tax, there is a large sum of money, amounting to more than three hundred thousand dollars ($300,000), dependent upon the decision in this case.

The plaintiff in error is a stockholder of the Third National Bank of St. Louis.

That institution was duly incorporated on the 25th of December, 1863, under the provisions of the Act of Congress entitled "An Act to provide a National Cur-

rency secured by a pledge of United States stocks, and to provide for the circulation thereof," approved February 25th, 1863. Prior to the passage of the Act of Congress last referred to, there were ten State Banks in Missouri, all Banks of issue, and chartered by the State under the provisions of the Banking law of 1857. By the provisions of that law, the State Banks were required to pay a bonus to the State, in lieu of all other taxation, of one per cent. upon the amount of their capital stock paid in. After the passage of the Act of Congress of the 25th of February, 1863, to provide a national currency, and the amendatory Act of June 3, 1864, several of those State Banks wound up their business as State Banks and their stockholders organized banking associations under the provisions of the Acts of Congress above referred to, and amongst those was the Third National Bank, organized by the stockholders of the Southern Bank of St. Louis, as above stated, on the 25th of December, 1863. Others of the State Banks retained their organization as such, and have still continued to do business under their original charters, except that they have long since withdrawn their notes from circulation.

In 1867, this being the condition of things, the plaintiff being the owner of two hundred shares of stock in the Third National Bank of St. Louis, was assessed upon a valuation of his shares of stock, and a tax assessed against him on that account of ninety-hundredths per cent. for State purposes, forty-hundredths

per cent. for County purposes, and forty-hundre[ks] per cent. for School purposes, being nearly two[al] cent. *ad valorem* upon his stock in the Third Nati[on] Bank—the State Banks which retained their orga[te] tions under the State law of 1857 being only requ[ed] to pay one per cent. upon the amount of capital s[he] paid in. The plaintiff resisted the payment of the[ed] whereupon the Collector proceeded to collect the[of] by seizing the property of the plaintiff.

Suit was brought by the plaintiff against the Co[ive] tor, setting out in his petition the facts above st[hts] Defendant demurred to the petition, and the dem[nal] was sustained by the St. Louis Circuit Court; judg[nen] went upon the demurrer, and the case was taker[t of] writ of error to the Supreme Court of Missouri, w[ted] the judgment of the Circuit Court was affirmed.

The case is brought to this court by writ of err[r or] the Supreme Court of Missouri.

The plaintiff in error submits the following poin[and]

I. The tax in question is not imposed in confor[hed] to the provisions of the Acts of Congress in relati[r be] the creation of National Banks, because it exceed[l be] rate imposed upon the shares in any of the b[ules] orgnaized under the authority of the State of Miss[d by] and therefore is in conflict with the *proviso* to the section of the Act of Congress of Feb. 3, 1864.

The Third National Bank of St. Louis, of which plaintiff in this case is a stock-holder, was creat[ank-] *e per*

rency secured by a pledge of United States stocks, and to provide for the circulation thereof," approved February 25th, 1863. Prior to the passage of the Act of Congress last referred to, there were ten State Banks in Missouri, all Banks of issue, and chartered by the State under the provisions of the Banking law of 1857. By the provisions of that law, the State Banks were required to pay a bonus to the State, in lieu of all other taxation, of one per cent. upon the amount of their capital stock paid in. After the passage of the Act of Congress of the 25th of February, 1863, to provide a national currency, and the amendatory Act of June 3, 1864, several of those State Banks wound up their business as State Banks and their stockholders organized banking associations under the provisions of the Acts of Congress above referred to, and amongst those was the Third National Bank, organized by the stockholders of the Southern Bank of St. Louis, as above stated, on the 25th of December, 1863. Others of the State Banks retained their organization as such, and have still continued to do business under their original charters, except that they have long since withdrawn their notes from circulation.

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Suit was brought by the plaintiff against the Collector, setting out in his petition the facts above stated. Defendant demurred to the petition, and the demurrer was sustained by the St. Louis Circuit Court; judgment went upon the demurrer, and the case was taken by writ of error to the Supreme Court of Missouri, where the judgment of the Circuit Court was affirmed.

The case is brought to this court by writ of error to the Supreme Court of Missouri.

The plaintiff in error submits the following points:

I. The tax in question is not imposed in conformity to the provisions of the Acts of Congress in relation to the creation of National Banks, because it exceeds the rate imposed upon the shares in any of the banks orgnaized under the authority of the State of Missouri, and therefore is in conflict with the *proviso* to the 41st section of the Act of Congress of Feb. 3, 1864.

The Third National Bank of St. Louis, of which the plaintiff in this case is a stock-holder, was created on

the 25th day of December, A. D. 1863, under the provisions of the Act of Congress of Feb. 25th, 1863.

See Session Acts of 1862–'3, p. 665.

This Act was amended by the Act of June 3d, 1864.

See Session Acts of 1864, p. 99.

By the 62d section of the last named Act, it is provided:

That "Associations organized under the Act of Feb. 25th, 1863, shall enjoy all the rights and privileges, and be subject to all duties, liabilities and restrictions imposed by the Act of 1864."

The proviso to the 41st section of the Act of 1864 declares:

"That nothing in this Act shall be construed to prevent all the shares in any of the said associations held by any person or body corporate from being included in the valuation of personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such a bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.

"*Provided, further*, That the tax so imposed, under the laws of any State, upon the shares of any of the associations authorized by this Act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located."

The shares of stock in any of the National Banks may then be included in the valuation of the personal property of the shareholder, but the *rate* of taxation imposed on such a valuation shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State.

What then was the rate of taxation imposed by the State of Missouri upon the shares of banks organized under State authority, at the time of the passage of the Act of Congress of June, 1864?

Congress assumed, as it had a right to do, legislative control over the whole subject, and whatever rights were acquired by the stockholders of the National Banks, under the Act of Congress, in view of the then existing laws of Missouri, became, from the moment of the organization of the Banking Association, vested rights which the State has no authority to impair or interfere with.

The only State Banks in existence in Missouri, and organized under State authority, were those established under the General Banking law of 1857.

The first section of the Banking law declares:

"§ 1. Every Bank which now is or shall hereafter be incorporated under the authority of the State, shall be subject to the liabilities and governed by the rules contained in this Act."

"§ 32. In consideration of the privileges granted by this Act to banks incorporated in this State, each banking company agrees to pay the State, annually, *one per*

cent. on the amount of capital stock paid by the stockholders, other than the State, which shall be in full of all bonus, and other taxes, to be paid to the State by the respective banks."

See Session Acts of Mo., 1857, p. 22.

By the 12th section of the Act of the Missouri Legislature, of March 18, 1861, amendatory of the Act of 1857, it is provided as follows:

"That the one per cent. required to be paid by the 32d section of Art. I. of said Act (Banking Act) *shall be received as full compensation for all taxes of every kind whatever*; and it shall not be lawful for any county, city or town corporation to levy or collect any tax of any kind upon or from any banks organized under said law."

See Missouri Session Acts of 1861, p. 13.

At the time of the passage of the Act of Congress of June, 1864, there was no other mode or amount of taxation on State Banks than is provided by the General Banking law above recited, and the amendment thereto. The State had expressly stipulated that there should be none other; the stockholders, as such, were not taxed upon their shares, nor could they be taxed; there was no tax upon shares, but a tax upon the capital of the bank, in the form of a *bonus* for the privilege of banking; there was no provision for an *ad valorem* tax of any kind.

If the State has bound itself not to tax the bank, it could not tax the shares of stock in the bank.

See Gordon v. The Appeal Tax Court, 3 How. 147.
State v. Brannin, 3 Zabriskie, p. 484.

In the case in 3 Howard, the Legislature of Maryland had provided, by the 11th section of the Act of 1812, that upon the banks complying with the conditions of the Act, the faith of the State is pledged not to impose any further tax or bonus on said banks during the continuance of their charters; and this Court held that the Legislature of Maryland could not, by a subsequent Act, tax the stockholders upon their shares of stock.

"It is our opinion that the Act of 1841, in so far as it imposes a tax upon the stockholders in those banks on account of their stock, does impair the obligation of a contract, and is void by the 10th section of the 1st article of the Constitution of the United States."—(See p. 149.)

"When an incorporated company is, by its charter, exempt from taxation, the stock of the company in the hands of stock-holders cannot be taxed; it represents and is the title to the property of the company, and is therefore included in the exemption of the charter."

3d Zabriskie, above cited.

And though it may be conceded, as has been held by this Court in the case of Van Allen v. The Assessors, that a tax on capital is not an equivalent for a tax on shares; yet it is very clear that a contract to exempt the bank from further taxation, in consideration of the

payment of a certain tax or bonus upon capital, is a contract to exempt the shareholders, who constitute the bank, from further taxation. The bank—the whole corporation is exempt from further taxation.

II. It is claimed, however, that by the General Revenue law of Missouri, in force at the time of the passage of the Act of Congress of June 3d, 1864, it is provided, amongst other objects of taxation, that:

"Shares of stock in banks and other incorporated companies" shall be subject to assessment for taxation as other property.

See Session Acts of Mo. 1863, p. 65.

Act concerning Revenue, approved Feb. 4, 1864.

That provision is still contained in the Revenue law of the State, and was at the time of the assessment in controversy in this case, and it is under the provisions of that law that the assessment of the tax in question is claimed to be valid.

The Revised Code of Missouri of 1855 contained a similar provision; it provided for an *ad valorem* assessment of "shares of stocks in banks and other incorporated companies."

See Rev. Code of Mo. of 1855, p. 1322, sec. 1.

That provision, without change of phraseology, has remained as a part of the Revenue law of Missouri from that time to the present.

On the 23d of January, 1857, the following amendment to the Constitution of Missouri was adopted:

"That Article eight of the Constitution of the State of Missouri, respecting banks, be and the same is hereby abolished, and the following substituted in lieu thereof:

"Article VIII. The General Assembly shall have power to establish such bank or banks as may be deemed necessary for the interests of the State, but any bank so established shall be based upon a specie capital, and made liable to redeem *its issues* in gold or silver: *Provided*, that the number of banks chartered shall never exceed ten, and the aggregate amount of capital shall never exceed twenty millions of dollars."

At the very same session of the Legislature which gave the final vote adopting this amendment to the Constitution, the Banking Act of 1857, above referred to, was passed. That Act provided for the creation and organization of *ten* banks, the maximum number provided for by the amendment to the Constitution, and they were all organized and went into operation as banks of issue; the whole legislative power of the State on the subject of banks was exhausted.

By the express terms of the Constitution there could be no other banks. By the provisions of the very Act by which those banks were chartered, the State bound itself in a contract with those banks, that the payment of one per cent. upon the capital stock paid in by the stockholders should be in full of all *bonus* and other taxes; this was one of the fundamental conditions of their organization.

The General Revenue law of Missouri, then providing for the assessment of "shares of stock in banks and other incorporated companies," could not apply to to those banks, nor could it apply to any other banks in the State, because, by express provision of the Constitution, none others could be created by State authority.

So remained the Constitution of the State up to 1865, when the new Constitution was adopted which prohibited the establishment of any banks of issue.

See sec. 1, Art. VIII. of the Constitution of Mo.

The provision, therefore, of the Revenue law is a mere nullity. There was nothing upon which it could operate after the amendment to the Constitution. It may once have had a meaning, but not after the passage of the Act of 1857.

After the passage of the Acts of Congress providing for the establishment of Banking Associations, most of those banks organized and went into operation as National Banks under the Acts of Congress. Several of them, however, retained their original organization as State Banks, and were in existence as such, and taxed only under the provisions of the State law of 1857, at the time the assessment was made against the shares of stock of the plaintiff in the Third National Bank of Missouri.

Can it be said that such assessment was made in accordance with the *proviso* to the 41st section of the Act of Congress of June 3d, 1864?

The Act of Congress provides that the tax imposed upon the shares of stock in National Banks shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located. The *stockholders* in the State Banks were not taxed, nor could they be taxed, as such; there was no tax upon shares, but a tax on the capital of the bank; there was no provision for an ad valorem tax of any kind; it would have been a breach of public faith and a violation of a solemn contract to have imposed any such tax; the State has no power to impose any such tax.

This Court held, in the case of Bradley v. The People, (4th Wallace, p. 459, affirming the decision in the case of Van Allen v. Nolan,) "that the tax on the capital of a bank is not the same thing as the tax upon the shares of which the capital is composed; and where a State imposes on a State Bank a tax on its capital, (the shares in the hands of share-holders being exempt from tax), it cannot lay a tax on the shares of the banks organized under the Acts of Congress to provide a national currency."

The Act of the Illinois Legislature of Feb. 14, 1857, under which this decision was made, provides for taxing the capital stock of the banks, together with the surplus profits, or reserve funds; no tax was imposed specifically on the shares held by the stockholders.

So that precisely the same question is presented in this case as in the case of Bradley v. The People;

because, under the laws of Missouri, there could be no tax except a tax on capital, or rather a *bonus* was to be paid in lieu of all taxation.

III. It is claimed that the Legislature of Missouri passed a law, authorizing the State Banks to wind up their business as State Banks, and reorganize as National Banks ; that the Third National Bank of St. Louis, of which plaintiff is a stockholder, did reorganize as a National Bank, and that the State was thereby released from its obligation made with the Banks by the Act of 1857. But what effect can this have upon the question at issue?

The Act was passed February 12, 1864. (See Session Acts of Missouri of 1863-4—Adjourned Session, p. 9.) It purports to be a mere proposition to the Banks, which they might accept or reject. It could be nothing else, because the immunities provided by their charters secured them against any forced action on the part of the State. So long as they complied with the provisions of the law, they could not be forced to wind up their business as State Banks.

Some of them did reorganize as National Banks, others did not. The Third National Bank reorganized as a National Bank on the 25th of December, 1863—long before the passage of the Act of the Legislature referred to. The effect of this reorganization was to give up their charters as State Banks, with all the privileges and exemptions secured by them. As Na-

tional Banks, they could claim nothing under the State law. They were created by Act of Congress, and derived all their rights and privileges from the Act of Congress. They became independent of the State laws, except so far as the Act of Congress which created them chose to submit them or their shareholders to State legislation.

"A subject matter over which Congress and the States may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the States, there is no doubt Congress may withhold the exercise of that authority." (See Van Allen v. The Assessors, 3 Wallace, p. 585.)

When a National Bank is organized under the Acts of Congress, whether its stockholders consist of the same persons who at one time were stockholders in a State Bank, or of others in no way whatever connected with it, the institution becomes a new corporation, deriving its powers from a different source.

The Act of the Legislature can in no sense be considered an act to authorize the State Banks to become National Banks, because that is done without the authority of the State; it is simply an authority to wind up their business as State Banks, the effect of which is to release them from obligations to the State, and to release the State from obligations to them. If they accept the proposition, the stockholders are free to form banking associations under the Act of Congress,

which subjects the shares of stock in such a bank to the same burdens only as are imposed upon shares of stock in the State Banks.

The State can impose no restrictions or limitations or conditions or burdens upon stockholders of a National Bank by express legislation or by implication, inconsistent with the provisions of the Act of Congress by which the bank was created, because the act of Congress is supreme over the State law, and the stockholders are entitled to all the privileges and exemptions granted by the Act of Congress, in spite of any supposed obligations they may be under to the State.

IV. It is said that the word Bank does not necessarily mean a bank of issue, and that inasmuch as there are and have been other institutions in the State of Missouri which buy and sell bills of exchange, discount paper, and receive money on deposit, which may be called banks (although they are not so called), that therefore they are the institutions referred to in the *proviso* to the 41st section of the Act of Congress as "*the banks organized under the authority of the State where such association is located.*"

In one sense they may be banks, but as a matter of fact they are not called banks, nor do they come within the meaning of the word bank as used in the Act of Congress or the Constitution of the State of Missouri.

The Constitution says that no more than *ten banks*

shall be created. The ten banks were created, as I have shown, under the Act of 1857. No other bank could be created; and if an institution is created and called a bank, it is simply a misnomer. So far as I am aware, the Legislature has done no such foolish thing.

The Constitution further says that the banks so created shall be made liable to redeem their *issues in gold or silver, and shall be based upon a specie capital.* This shows that they were to be banks of issue, and that the word bank, as used in the Constitution of Missouri, means a bank of issue.

But the important question is not what the State means by a bank, but what does Congress mean when it uses that term in the act of June 3, 1864?

The object of the Act of Congress providing for the creation of National Banks is clearly explained in the title. It is:

"An Act to provide a *National Currency*, secured by pledge of United States stocks, and to provide for the circulation and redemption thereof."

It is a part of the history of the country that a *national currency* was needed, as one of the sinews of the war then prosecuted in defense of the Government.

To make the currency *national* it was necessary to protect it against the competition of State Bank circulation. If the State Banks could put out their circulation under more favorable circumstances than the National Banks, they could drive out the National Bank

circulation, and defeat the very object which Congress had in view—the creation of a national currency.

There was nothing to fear from *Banks* which had no circulation, if any such there were. Hence, it was provided that although shares of stock in National Banks might be taxed by the State as other property, it should not exceed the rate imposed upon the shares in any of the banks organized under State authority. The National Banks were not to have burdens imposed upon them, from which the State Banks were exempt. The States were not to be permitted to tax them out of existence. It is absurd to suppose that Congress meant anything else than banks of issue.

Besides, the State has determined the definition of the term bank, so far as this question of exemption from taxation is concerned, by the first section of the Banking Act of 1857. It says:

"Every bank which now is, or shall hereafter be incorporated, under the authority of the State, shall be subject to the liabilities and governed by the rules contained in this act." *Supra* Acts of 1857, p. 22.

The Act provided for banks of issue, and none other, and none other could be created under the Constitution.

V. If it be admitted that the shares of stock in National Banks, located in Missouri, are taxable under

the General Revenue laws of the State above referred to, then the mode of assessment provided by that law is objectionable, and inconsistent with the provisions of the Act of Congress of June 3, 1864.

That mode of assessment is as follows:

"§ 27. Persons owning shares of stock in banks and other incorporated companies taxable by law, are not required to deliver to the Assessor a list thereof, but the President or other chief officer of such corporations shall deliver to the Assessor a list of all shares of stock held therein, and the names of the persons who hold the same.

"§ 28. The tax assessed on shares of stock embraced in such list, shall be paid by the corporations respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from dividends accruing on such shares; and the amount so paid shall be a lien on such shares respectively, and shall be paid before a transfer thereof can be made."

See Chap. 12, p. 103, Gen. Statutes of Mo., 1865.

Thus, it will appear that the assessment is to be made against the corporation, and the tax to be paid by the corporation.

The Act of Congress provides that the *shares of stock* of an individual or of a corporation held in a National Bank may be included in the valuation of personal

circulation, and defeat the very object which Congress had in view—the creation of a national currency.

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The Act of Congress provides that the *shares of stock* of an individual or of a corporation held in a National Bank may be included in the valuation of personal

property of such individual or corporation in the assessment of State taxes.

The mode of assessment as well as the amount is pointed out by the law, and the State law must conform to it. It is the *shareholder* who may be taxed, and not the Bank.

The tax cannot be paid over the counter of the bank. This would subject the bank to a foreign and hostile jurisdiction. It would give the States the power to control the Banks, which are created under the authority of the Federal Government to provide a national currency.

The National Banks are independent of State legislation, and ought to be so, to subserve the purposes of their creation.

See decision of Judge Agnew, in case of Markoe v. Hartranft, 6 Am. Law Jour. 487; approved by the Supreme Court of Pennsylvania, in case of Pittsburg v. First National Bank.

See 55 Penn. State Reports, p. 52.

The provisions of the Pennsylvania law are in this respect substantially the same with those of the Missouri law.

It is true, that in the case of the plaintiff in error, the assessment was made directly against the stockholder. But this was clearly without any authority of law. The State law authorized no such mode of as-

sessment, and the Act of Congress could give no authority to State officers in the matter of assessing and collecting State revenue. Whatever authority the officer may have as State Assessor, he must, of course, derive from the State law.

Congress has nowhere undertaken to prescribe the duties of State officers in this respect, but only to fix the limits of State legislation.

The assessment and levy of the tax, in this case, then, was without authority of law. It is an attempt on the part of the State authorities to discriminate against the holders of shares of stock in the National Banks, to impose burdens upon them which are not imposed upon the stockholders of the State Banks. So long as any of the State Banks in Missouri organized under the provisions of the Banking Law of 1867 choose to retain their charters, they are exempt from any other mode or measure of taxation than that imposed upon them by the terms of that law. Their charters cannot be altered in this respect without impairing the obligations of the contract made with them by the State. That point is so well established by the decisions of this court, that it is no longer an open question. In the two cases recently decided by this court, the Home of the Friendless v. E. S. Rowse, and Washington University v. Edward S. Rowse, the doctrine was maintained to its fullest extent.

In delivering the opinion in the first-named case, the Court, after declaring that the provision of the Act of the Legislature, declaring that "*the property of the corporation is exempt from taxation*" was a contract, goes on to say:

"The validity of this contract is questioned on the ground that the Legislature had no authority to grant away the power of taxation. The answer to this position is, that the question is no longer open for argument here, for it is settled by repeated adjudications of this Court, that a State may, by contract based upon a consideration, exempt the property of an individual or corporation from taxation, either for a specified period or permanently, and it is equally well settled that the exemption is presumed to be on sufficient consideration, and binds the State, if the charter containing it is accepted."

See also, Gordon v. The Appeal Tax Court, 3 Howard 133.

Piqua Bank v. Knoop, 16 Howard, 369.

Ohio Life and Trust Co. v. Debolt, 16 Howard, 416.

Dodge v. Woolsey, 18 Howard, 331.

Mechanics and Traders' Bank v. Thomas, 18 Howard, 384.

Mechanics and Traders' Bank v. Debolt, 18 Howard, 380.

McGee v. Matthis, 4 Wallace, 143.

Certainly, there can be no distinction in principle between a contract to exempt entirely from taxation and a contract not to tax beyond a given amount or rate, or, in other words, to exempt from taxation to a certain extent. There is nothing in the Act of the Legislature of Missouri exempting the Banks from taxation, which takes it out of the purview of the decisions above referred to. It is true, that the first part of the section of the law referred to declares that "in consideration of the privileges granted by this act to banks incorporated in this State, each banking company agrees to pay the State annually one per cent. upon the amount of capital stock paid by the stockholders;" but it further declares that "this shall be in full of all bonus and other taxes to be paid to the State." The first is an agreement on the part of the banks, upon the acceptance of the charter, to pay the *one per cent.* in consideration of the privileges granted. The latter is an agreement on the part of the State to exempt from further taxation, in consideration of the benefit to be derived to the State in furnishing State Bank paper for circulation. The amendment to the State Constitution, which provides for the creation of such banks, authorizes the General Assembly to establish such bank or banks as may be deemed *necessary for the interests of the State*, not exceeding ten in number. They

were created, then, because the interests of the State required it, and this is a sufficient consideration.

"There is no necessity of looking for the consideration for a legislative contract outside of the objects for which the corporation was created; those objects were deemed by the Legislature beneficial to the community, and the benefit constitutes the consideration for the contract, and no other is required to support it."

See Home of the Friendless v. E. S. Rowse.

"Of the sufficiency of the consideration, whether it was a bonus paid by the bank, or in supplying a sound currency, the Legislature would be the exclusive judges; this would constitute a contract which the Legislature could not impair."

See State Bank of Ohio v. Knoop, 16 Howard, 388.

In this case the statutes of Ohio provided that six per cent. on the profits should be "in lieu of all taxes to which the company or stockholders would otherwise be subject."

"Banks and other companies may be exempted by contract from their equal share of the taxes, under the belief that the corporation may prove to be a public benefit; experience may prove that it is a public injury; yet if the contract was within the scope of the authority conferred by the Constitution of the State, it is like any other contract made by competent authority, binding upon the parties; nor can the people,

or their representatives, by any act of theirs, afterwards impair its obligation."

Ohio Life Ins. & Trust Co. v. Debolt, 16 How. 429. Affirmed in cases of

Mechanics & Traders' Bank v. Thomas, 18 Howard, 384.

Same v. DeBolt, 18 Howard, 380.

Dodge v. Wolsey, 18 Howard, 331.

If, then, by solemn compact with the State of Missouri, the shares of stock in the State Banks are exempt from taxation, by what authority can it be said that the State may impose a tax upon the shares of stock in National Banking Associations, when the Act of Congress, under whose authority alone the State can impose any tax whatever upon the holders of stock in National Banks has declared that such tax shall not exceed the rate imposed upon the shares of stock in any of the banks organized under the authority of the State where the National Banking Association is located?

Under the State law there is no rate of tax on shares; a specific tax on capital paid in, is not a rate of tax of an assessed valuation of shares, and in the nature of things cannot be; and yet it is the latter mode of taxation only that the Act of Congress contemplates; the State is authorized to include the shares of stock in the

valuation of personal property of the shareholder for taxation, provided the shares of stock in State Banks are taxed, and provided the rate of tax imposed on shares in National Banks is not greater than the rate on the shares of stock in the State Banks.

To say that the General Revenue law of the State, providing that "shares of stock in banks and other incorporated companies may be assessed and taxed as other property," authorizes the assessment and levy of a tax on shares of stock in National Banks, is to say that it authorizes the assessment and levy of a tax, in the same way, on the shares of stock in all the State Banks, for no particular kinds of banks are designated; and yet it is perfectly clear that those chartered by the Act of 1857 are not subject to such taxation. To say that the Revenue law does not mean those banks, but the Savings Institutions, Insurance Companies and other corporations which may have authority under the law to discount paper, receive money on deposit and buy and sell bills of exchange—and that these are the banks referred to in the Act of Congress, is to say what the State law does not declare, and what the Act of Congress could not have contemplated, unless we can suppose that those who framed the "*Act to provide a National Currency*," by the establishment of National Banks of circulation, wished to protect those National

Banks and the persons who held their stock from competition with institutions that could not issue paper, and leave them to the mercy of banking institutions that had a circulation protected by the favored legislation of the State.

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Supreme Court

OF THE UNITED STATES.

John R. Lionberger, Plaintiff in Error, *vs.* Edward S. Rowse, Defendant in Error.	No. 129.

Brief for Plaintiff in Error.

This cause comes up from the Supreme Court of the State of Missouri, under the 25th section of the Judiciary Act, and raises the question of the validity of a tax upon stock of the National Banks in the State of Missouri, levied under the authority of a statute of that State. The decision of the State Court was in favor of this authority of the State, and against the exemption claimed under the Constitution and laws of the United States, whereupon this writ of error is brought.

The actual circumstances under which the tax was levied and contested, are stated in full in the brief filed by Mr. Broadhead, of counsel for the plaintiff in error.

POINTS.

First Point.—The validity of the State taxation of the stock of the "Third National Bank of St. Louis," of which the plaintiff below, now the plaintiff in error, complains, depends wholly upon the question whether such taxation is conformed to the permissive authority for taxation by the State, given by the 41st section of the Act of Congress of June 3d, 1864.

The Legislation of Missouri on the subject of Bank Taxation, is as follows:

I. An amendment of the Constitution of Missouri, adopted in January, 1857, provides that, "The General Assembly shall have power to establish such bank or banks as may be deemed necessary for the interests of the State, but any bank so established shall be based upon specie capital, and made liable to redeem its issues in gold or silver: Provided that the number of banks chartered shall never exceed ten, and the aggregate amount of capital shall never exceed twenty millions of dollars."

II. In the same year, 1857, the Legislature of Missouri passed a General Bank Act, and created, at once, the ten banks authorized by the Constitution. Among its provisions are the following:

"§ 1. Every bank which now is or shall hereafter be incorporated under the authority of the State, shall be subject to the liabilities and governed by the rules contained in this Act."

"§ 32. In consideration of the privileges granted by this Act to banks incorporated in this

State, each banking company agrees to pay the State annually, one per cent. on the amount of capital stock paid by the stockholders, other than the State, which shall be in full of all bonus and other taxes, to be paid to the State by the respective banks."

III. A subsequent Act of March 18, 1861, further provides, that—

"§ 12. The one per cent. required to be paid by section thirty-two of Article One of said Act, shall be received as full compensation for all taxes of every kind whatever; and it shall not be lawful for any County, City or Town Corporation to levy or collect any tax, of any kind, upon or from any of the banks organized under said law."

IV. The Revised Code of Missouri of 1855, provides for an *ad valorem* assessment of "shares of stock in banks and other incorporated companies," and in the Act concerning revenue of February 4, 1864, it is provided, that "shares of stock in banks and other incorporated companies" shall be subject to assessment for taxation as other property.

This law was in force at the time of the taxation in this case.

V. The statute provides the mode of assessment as follows:

"§ 27. Persons owning shares of stock in banks and other incorporated companies, taxable by law, are not required to deliver to the assessor a list thereof, but the President or other chief officer of such corporation shall deliver to the assessor

a list of all shares of stock held therein, and the names of the persons who hold the same."

"§ 28. The tax assessed on shares of stock, embraced in said list, shall be paid by the corporations respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from dividends accruing on such shares; and the amount so paid shall be a lien on such shares respectively, and shall be paid before a transfer thereof can be made."

Ch. 12, p. 103, Gen. St. Mo., 1865.

It was under this state of the law of Missouri, that the tax upon the shares of the plaintiff in error in the "Third National Bank of St. Louis" was levied, and upon this State of the law of Missouri, the question of the conformity of such taxation, with the provisions of the 41st Section of the Act of Congress of June 3, 1864, arises.

Second Point.—The taxation attempted by the State of Missouri cannot be supported upon the mere authority of the State, unaided by the Federal authority, (assenting to the taxation of the stock of National Banks), given by the 41st section of the Act of Congress of June 3, 1864.

I. It is settled by adjudged cases in this Court, that this Bank, in its corporate capacity, is not subject to taxation, by the laws or under the authority of a State, upon its franchise or operations or capital, but that it is wholly exempt from such taxation by reason of its relation to the Federal Gov-

ernment, as an agency or instrument in the exercise of its constitutional powers.

McCullough vs. Maryland, 4 Wheat., 316.
Osborn vs. U. S. Bank, 9 Wheat., 738.
The People vs. Commis., &c., 23 N. Y. R., 204.
Dobbins vs. Commis., &c., 16 Peters, 435.

II. It is also settled by decisions of this Court, that such State taxation, in the form of an imposition upon the *shares* of stock, equally requires the permissive authority of Federal legislation for its competency and validity.

Gordon vs. The Appeal Court, 3 How., 133.
Van Allen vs. The Assessors, 3 Wall, 573.
People vs. The Commissioners, 4 Wall, 244.
Bradley vs. The People, Ib., 359.

Thus *Mr. Justice Nelson* delivering the opinion of the majority of the Court in *Van Allen* vs. *The Assessors*, says:

"The decree of the Court of Appeals from which this cause comes to us, must be reversed *on the ground that the enabling act of the State of New York, passed March 9th, does not conform to the limitations prescribed by the forty-first section of the act of Congress, passed June 3, 1864, organizing the National Banks and providing for their taxation.*"

P. 581.

And, the Chief Justice, in the dissenting opinion, in which Justices Wayne and Swayne concurred, says:

"We do not understand the majority of

the Court as asserting that shares of capital invested in National securities could be taxed without authority from Congress. We certainly cannot yield our assent to any such proposition."

P. 593.

Third Point.—The authority of the State taxation in question can claim no aid or sanction from the 41st section of the National Currency Act, for the taxation complained of does not conform to the affirmative limitations of that section to the taxation conceded by its terms.

U. S. Stat., Vol. XII. p. 111.

I. The State taxation authorized by the Act of Congress, (in its affirmative concession and aside from the subsequent restrictive conditions imposed), is limited to a permission that the shares of the National Banks held by any person or body corporate, may be "*included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority.*"

This is the operative and essential limitation, upon and within which the general exemption from State taxation is relaxed, and beyond which the exemption is, and upon the highest considerations needed to be, preserved.

Of itself, and without the specific additional restrictions afterwards imposed, it secures two great objects.

First. It preserves the corporate organizations,

being instruments of the Constitutional powers of the General Government, from any scrutiny or supervision of the State authorities, as preliminary to, or attendant upon, taxation, and also from the *dominion* which the taxation, the collection and the enforcement of taxes, imply and demand. The National Banks themselves *are not* subjected to the taxing power of the State at all.

Second. It secures, substantially, indiscriminate and impartial treatment for the permitted taxation, by merging the specific character of the property, as a subject of State taxation, in the mass and value of the property of the citizens of the State from which it exacts its revenues. It is for its *value* in, and as part of, the *property* of the individual taxed, and not for its nature and in its relation to the national and corporate uses and functions, that it is opened to the taxation of the State.

Besides, the regulative and prohibitory conditions upon State taxation, subsequently imposed, all rest, for their adequate and practical maintenance, upon this original affirmative limitation of taxation.

II. The scheme of taxation of the State of Missouri is directly repugnant to this affirmative requirement of the 41st section.

It assesses the tax upon the banks in their corporate capacity.

It compels the payment of the tax by the banks in their corporate capacity.

It thus subjects the National Banks to the dominion of the taxing power of the State in their corporate capacity.

III. This scheme of taxation admits of, and inevitably tends to taxation upon different principles, and upon different results to the tax-payer, from those which would attend the assessment of these shares as a part of the value of the tax-payer's personal property.

Upon this scheme, the shares of the National Banks are made to, bear the tax imposed according to *their* value, and not according to the general result of the valuation of the tax-payer's property as yielding, or failing to yield, a surplus for taxation.

This possible discrimination, to the prejudice of the National Bank shares the clause of the 41st section now under consideration was designed to, and does, prevent.

The faults of this scheme of taxation, as applicable to shares of National Banks, may be illustrated by comparing it with the terms of the New York Statute, which was approved as a legal method of taxation by this Court, as quoted in case of "People *vs.* The Commissioners," (4 *Wall*, 245.

Fourth Point.—The taxation in question violates the *restrictive* and *prohibitory* conditions imposed upon the authority of State taxation upon the shares of National Banks by the 41st section of the National currency Act.

This section provides, as the final condition to the validity of State taxation of the shares of National Banks, that the tax so imposed "*shall not exceed*

the rate imposed upon the shares in any of the Banks organized under authority of the State" where the National Bank is located.

1.—It is apparent from the existing legislation of Missouri, respecting banks and their taxation, that, as matter of law and as matter of fact, the *shares* of stock in the State banks are not taxed at all.

This is fatal to the validity of the attempted taxation of the shares of the National Banks.

Van Allen *vs.* The Assessors.
Bradley *vs.* The People, *ut supra.*

II.—It is equally apparent that, by the existing legislation of Missouri, the rate of taxation of the *capital* of the State Banks is not the rate imposed upon the National Bank shares by the taxation complained of.

Statutes of Missouri, *ut supra.*

That the Statute of Missouri, *by contract with these State Banks*, has incapacitated itself from laying upon the capital or shares of the State Banks the same rate which it exacts upon the stock of the National Banks, only confirms the fatal fact that the equality and conformity required by the 41st section of the National Currency Act are not observed in the taxation complained of.

III—The fact that certain State institutions—sometimes called banks, and without impropriety, are subjected to the same rate and method of taxation as are applied to the National Banks is wholly insignificant in the argument.

So long as a disparity exists between the rates and methods of taxation applied to the National Banks and *any* State Bank, the equality and conformity required by the provisions of the National Currency Act are violated, and the taxation of the State thus faulty is invalid.

Fifth Point.—The tax imposed and collected from the plaintiff in error, under the laws of Missouri, should be declared void for repugnancy to the right claimed under the Constitution and Laws of the United States, and the judgment below should be reversed, and judgment given for the plaintiff below on the demurrer.

WM. M. EVARTS,
Of Counsel for Plaintiff
in Error.

IN THE

Supreme Court of the United States.

No. 129.—December Term, 1869.

JOHN R. LIONBERGER, Plaintiff in Error,

vs.

EDWARD S. ROWSE.

Error to the Supreme Court of the State of Missouri.

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IN THE

Supreme Court of the United States.

No. 129.—DECEMBER TERM, 1869.

JOHN R. LIONBERGER, PLAINTIFF IN ERROR,

vs.

EDWARD S. ROWSE.

Error to the Supreme Court of the State of Missouri.

STATEMENT.

Plaintiff in error, a shareholder in the Third National Bank of St. Louis, brought this suit against the defendant, the collector of state taxes, to test the legality of the state tax upon the shares of the national banks in Missouri.

His petition to the Circuit Court of St. Louis county states, that upon a valuation of 200 shares of the Third National Bank of St. Louis, belonging to him, by the proper officers, they illegally levied against them a tax of $\frac{90}{100}$ of one per cent. for state purposes, $\frac{40}{100}$ of one per cent. for county purposes, and the same amount for school purposes. That a tax bill for these several sums was placed in the hands of defendant as collector, who, on the 14th day of September, 1867, seized certain bank notes belonging to the plaintiff, and appropriated them to the payment of said tax. The petition farther states, that when said tax was levied and collected, there were in

operation in the state certain state banks organized under the general banking act of 1857.

The defendant demurred to the petition. The circuit court sustained the demurrer, and the supreme court affirmed the judgment of that court. The case is brought here under the 25th section of the judiciary act.

When this tax was assessed and collected there were nominally two kinds of banks in Missouri organized under state authority: 1st. Institutions which, besides receiving deposits, loaning money, and dealing in exchange, which constitutes banking, had the privilege of issuing paper money. This privilege had been, however, practically abolished by acts of Congress in 1865 and 1866. 2d. Institutions which transacted all the business properly called banking, but which had not the privilege of issuing paper money. Ten of the first-named class of banks were established by the act of 1857, under the constitutional amendment of that year, but only two of them remained in existence in 1867 as state banks—the rest (of which the Third National Bank of St. Louis was one) having become national banks under the state enabling act of 12th July, 1864. Some of the second class of banks existed before the establishment of these banks of issue, others were subsequently established, and in 1867 they were more numerous and of much larger capital than the other class.

The act of 1857 declared that—

"*Each banking company* (incorporated under it) agrees to pay to the state annually one per cent. on the amount of capital stock paid in by the stockholders other than the state, which shall be in full of all bonus and taxes, to be paid to the state *by the respective banks.*"

By chapter 12 of the revised statutes of 1865, p. 103, it is provided as follows:

"SEC. 27. Persons owning shares of stock in banks and other incorporated companies, taxable by law, are not required to deliver to the assessor a list thereof; but the president, or other chief officer of such corporation, shall

deliver to the assessor a list of all shares of stock held therein and the names of persons who hold the same.

"SEC. 28. The taxes assessed on shares of stock embraced in such list shall be paid by the corporations respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares, and the amount so paid shall be a lien on such shares respectively, and shall be paid before a transfer thereof can be made."

By chapter 13, ib., p. 115, it is provided as follows:

"SEC. 26. The collectors shall diligently endeavor and use all lawful means to collect all the taxes which they are required to collect in their respective counties; and to that end they shall have power to seize and sell the goods and chattels of the person liable for taxes in the same manner as goods are, or may required to be, seized and sold under execution issued on judgments at law, and no property shall be exempt from seizure or sale for taxes; but no such seizure and sale of goods shall be made until the collector has demanded payment of the tax, either by personal application to the party liable to pay the same or by by visiting his place of abode for that purpose."

These provisions were re-enacted in the revised statutes of 1865, from sections 20, 21, and 24 of act of 4th February, 1864. The act of Congress of June 3d, 1864, 13 Stat., page 111, section 40, provides—

"That the president and cashier of every such association (national banks) shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted; and such list shall be subject to the inspection of all the shareholders and creditors of the association, *and the officers authorized to assess taxes under state authority, during business hours of each day on which business may be legally transacted.*"

By the 41st section, p. 112, it is also—

"*Provided*, That nothing in this act shall be construed to prevent all the shares in any of said associations, held by any person or body corporate, from being included in

the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority, at the place where such bank is located, and not elsewhere, *but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens in such state. Provided* further, That the tax *so* imposed, under the laws of any state, upon *the shares* of any of the associations authorized by this act. *shall not exceed* the rate imposed *upon the shares* in any of the banks organized under the authority of the state where such association is located. Provided, also. That nothing in this act shall exempt the real estate of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real estate is taxed."

ARGUMENT.

I. The plaintiff in error contended in the state courts that the tax was illegally imposed and collected, because—

1st. Under the laws of Missouri, above quoted, the assessment upon shares of bank stock was made against the banks, and not against the shareholders, and are to be collected from the bank, and were inapplicable to the plaintiff"s shares.

2d. The act of Congress requires the shares of national banks to be taxed not more than the shares of state banks, and that all the shares of the state banks, *properly so-called,* were exempt from taxation in consideration of the one per cent. paid on their capital stock.

These are the only questions presented by the record. The first is wholly a question on the construction of state statutes, which has been determined by the Supreme Court of Missouri against the plaintiff in error. That court has decided that the act of 4th February, 1864, applies to banks organized under authority of the state laws, and that under it, shares, in both state and national banks, are included in assessments against individual owners, and not against the banks. This assessment was against the individual stockholder, and not against the bank, and the stockholder, not the bank, is plaintiff.

The right of the states to tax resident shareholders in the national banks is recognized by Congress, and the officers in these banks are required to furnish the state officers with all the requisite information to enable them to give effect to this right.

Congress has not prescribed the mode by which the states shall exercise their right to tax this property. This belongs to the states, and hence the laws passed by the states to effectuate it are to be interpreted by the state courts, and their decisions are not subject to revision here. The state law in no respect conflicts with any act of Congress.

But whilst conceding to the states the right to tax the shares of stockholders in the national banks, and leaving it to the states to prescribe for themselves the *mode* of exercising this right, Congress has limited, by two provisos, the *measure* of state taxation upon these shares, so that it shall not exceed, 1st, the rate "*assessed upon other moneyed capital in the hands of individual citizens of such states;*" and 2d, "*the rate imposed upon the shares in any of the banks organized under the authority of the state.*"

The limit prescribed in the second proviso, it is alleged, is exceeded by the tax in this case, and this presents the question of the liability of the shareholders in banks organized under state authority, as plaintiff's case is same in Missouri as theirs. The ground upon which this allegation rests is, that the institutions whose shareholders pay the same rate of tax assessed against the shares of the plaintiff in error are not "banks organized under the authority of the state," and that the only institutions within the meaning of these words are the two institutions organized under the act of 1857, which, by the terms of their charter, pay one per cent. on their capital stock "in full of all bonus and taxes to be paid *by the respective banks*," and whose shareholders are alleged by plaintiff to be exempt from taxation by virtue of that contract.

The Supreme Court of Missouri decided that the two institutions organized under the act of 1857, were not the only banks in the state, but on the contrary, that they held a very inconsiderable portion of the banking capital organized and operating under the authority of the state.

The argument of the plaintiff is that the act of Congress authorizes the taxation of capital in national banks only at the same rate that state laws tax stockholders of banks of *circulation* in states; and that the stockholders of banks of circulation in Missouri are not subject to taxation in Missouri on their shares. This is really the only question in this case, for the state court has decided that the banking institutions organized under the laws of the state which confer banking privileges are banks; and this is in harmony with the ruling of this court in the case of The Bank for Savings v. The Collector, 3 Wall., 495, 512, which says: "Banks, in the commercial sense, are of three kinds, to wit: 1st, of deposit; 2d, of discount; 3d, of circulation; all or any two of these functions may be and frequently are exercised by the same association; but there are still banks of deposit, without authority to make discounts, or issue a circulating medium. Courts of justice, also, as well as text writers, recognize the well known distinction between banks of deposit and banks of discount or circulation." The revenue laws of Congress also recognize banks without circulation as banks for taxation.—(13 Stat., p. 277–8.)

6 Wall

The meaning given to the law by the plaintiff requires that the words "banks of issue" shall be interpolated.

The plaintiff argues that the constitution of Missouri of 1857 contemplated the ten banks of issue it authorized as the only banks in the state. But there were, prior to 1857, other banks in existence, and in the session of 1857 a large number of other banks were incorporated, and every session since 1857 other similar banks have been incorporated, which are daily in the courts as parties to suits, and the supreme court declares these banking in-

stitutions to be banks within the meaning of the state revenue law.

The object of the act of Congress of June 3, 1864, it is said, was to create a "National Currency," and if the states were permitted to subject the national banks to greater burdens than were imposed on the state banks of issue, the currency of the state banks might drive out that of the national banks. Hence this act must be construed as if the words "of issue" were interpolated in the text of the law, so that it would read, "that the rate imposed on national banks shall not exceed the rate imposed upon the shares in any of the banks (*of issue*) organized under the authority of the state." But this is neither expressed nor implied by the law, and is not necessary for the fulfillment of its objects.

The 41st section contains no reference to currency, and the national currency is guarded by the tax put upon the currency of the state banks by the act of 3d March, 1865, and 13th July, 1866, 13 U. S. Stat., p. 484, 14 ib., p. 146, the practical effect of which is, and was intended to be, to abolish state bank currency. The enquiry is thus narrowed down to the question whether Congress required, as a condition of state taxation on national banks, that the banks whose shares were to be equally taxed should be banks of issue, a condition rendered impossible by other acts of Congress.

II. The only fact relied on in plaintiff's petition to invalidate the tax against him was the existence of certain banks under the general banking law of the state of 1857, and the only use made of this fact was to argue that the banks so established were the only state banks, or, if not the only banks, were the only banks of the class (banks of issue) which could compete with the national banks, and hence were the only banks the tax on whose shareholders could properly be compared with the tax on shareholders in the national banks. The counsel for plaintiff claimed

that these holders were exempt, and hence that the plaintiff was also exempt.

This is the whole argument presented by the plaintiff in the state court.

The point argued by defendant's counsel, that the exemption of the shareholders in one or more banks by special contract, whilst the shareholders of the great mass of the banking capital of the state were subjected to taxation under the general revenue law, does not exempt the shareholders of the national banks, was not relied on by plaintiff in the state courts. If it should be presented here, it is sufficient to say that the proposition is the same substantially passed upon by this court in the case of The People vs. The Commissioners, 4 Wall., pp. 224, 256. There the shareholders insisted that as no tax could be assessed on United States securities, and the first proviso of the 41st section required that the tax on their shares should not exceed that "assessed on other moneyed capital in the hands of individual citizens," it followed that they were exempt. The court replied that the standard contemplated by the law was "*taxable*," not *non-taxable*, moneyed capital.

The first proviso should, therefore, be read as if that word were inserted in it. Thus read, it would be "that the shares should not be taxed at a greater rate than is assessed upon other (*taxable*) moneyed capital in the hands of individual citizens." And this applies equally to the second proviso, which, with that word inserted, would read, "that the tax * * upon the shares * * shall not exceed the rate imposed upon the (*taxable*) shares in any of the (state) banks." This reading carries out fully the object of the law. It subjects the shares of national banks to state taxation, but prevents its being excessive. It is assumed, with reason, that if the state taxes are not greater than are borne by state institutions the national banks can live under them, and ought to pay them also. If either the taxes are so heavy on shares that

state institutions subject to it are taxed out of existence, or, for any other reason, shares in state banks are not taxed at all, the tax thereupon ceases as to the national institutions. If the shares in state institutions are generally taxed, and bear it without having the currency privilege, *a fortiori* it can be borne by the national banks with that privilege. It is not contended either that the tax is onerous, or involves a principle dangerous to the objects of the law.

A state revenue law, dated prior to the national bank act taxing bank shares generally and equally with other moneyed capital in the hands of citizens, is equally operative on the shares of such banks as a subsequent revenue act, and meets the requirements of the bank act as fully as if it contained in the proviso of the 41st section in terms. Such an act cannot be suspected of the unfair discrimination this proviso was intended to guard against.

This case does not present the bond question. Exemption from the tax imposed is claimed, not because allowance was not made in the assessment for that part of the bank capital invested in United States bonds, but solely because the shares of certain state banks are not taxed.

III. This suit was brought on the supposition that under the decision of this court in Gordon v. The Appeal Tax Court, 3 Howard, 133, the shares in the banks organized under the Missouri act of 1857 were exempt from taxation; and the decision of the Supreme Court of the State of Missouri and our argument thus far concedes that proposition. But this is unwarranted. The exemption secured by the 32d section of that act is only to "the respective banks," and does not extend to the shareholders. It is true that in Gordon's case the languge of the Maryland act of 1821 was similar. That act declares "that upon any of the aforesaid banks accepting and complying with the conditions of this act, the faith of the state is hereby

pledged not to impose any further tax or burden upon them." The court construed this to exempt the shares from the tax imposed upon the shares by the act of 1841, not, however, because this was the natural import of the language, but because, under the circumstances of the case, it was deemed the proper construction to carry into effect the true meaning of the legislature. After quoting the act, as above, the court say, p. 146, "this is the language of grave deliberation, pledging the faith of the state for some purpose, some effectual purpose. Was that purpose the protection of the banks from what that legislature and succeeding legislatures could not do if the banks accepted the act, or from what they might do in the exercise of the taxing power? The terms and conditions of the act were, that the banks should construct the road and pay annually a designated charge upon their capital stocks as the price for the franchise of banking. The *power of the state to lay any further tax on the franchise was exhausted. That is the contract between the state and the banks.* It follows, as a matter of course, when the legislature go out of the contract, proposing to pledge its faith, if the banks shall accept the act, not to impose any further tax or burden upon them, that it must have meant by those words an exemption from some other tax than a further tax upon the franchise of the banks. The latter was already provided against." From such considerations the court concludes that the act exempted more than the franchise from taxation. But what more? The extent of the exemption is then inferred from the nature of the proposition which the act contained.

Being a proposition for exemption, dependent upon a change of the charter by a vote of the stockholders, it was a proposition addressed to them and not to the banks, which could not change the charters or accept the proposition of the legislature, the court infers that the stockholders should be the beneficiaries, although, in *terms*, the exemption applied only to the banks. This, too,

whilst the court held in the same opinion (p. 150) that "a franchise for banking is, in every state of the Union, recognized as property," ("which, like any other property, would be taxable if a price had not been paid for it,") and that "the banking capital attached to the franchise is another property owned in its parts by persons, corporate or natural, for which they are liable to be taxed."

The reasons for construing the word "banks," in the Maryland act, to mean shareholders, do not apply to the Missouri act of 1857. (1.) No vested rights then existed requiring other consideration than the franchise for the new obligations assumed by the bank. (2.) The exemption is in the original charter, and the only consideration is the *per centage* imposed on the nominal capital, and is, as this court says, (2 Black., p. 629,) "like one annexed to the franchise as a royalty for the grant." (3.) There is no room for construction. The agreement is with the banks; the payment is to be by them, and is to be in full only of all bonus and taxes to be paid *by* the banks, and the consideration is simply the franchise. This is the language: "In consideration of the privileges granted by this act to the banks incorporated in this state, each banking company agrees to pay the state annually one per cent. on the amount of the capital stock paid in by the stockholders, other than the state, which shall be in full of all bonus and taxes to be paid to the state *by the respective banks.*"

"The case ought to be very strong which would justify any court to depart from the terms of an act, and especially to adopt a restrictive construction, which is subversive of public rights."—(4 Peters, 505.) Speaking of the taxing power, at p. 514, the court says: "As the whole community is interested in retaining it undimished, that community has a right to insist that its abandonment ought not to be presumed in a case

in which the deliberate purpose of the state to abandon it does not appear."

The national bank act itself, the Gordon case, Van Allen's case, and other recent cases, recognize banks and the shares in them as distinct subjects of taxation, and that one may be exempt and the other subject to taxation, or both may be exempt or both taxed. When there is no language in the act of 1857 exempting anything but the banks from taxation, and no circumstance which sustains the inference that shareholders were included under that term, it would violate the rule which requires that the right to tax should not be held to be abandoned, save where the purpose to do so clearly appears, to exempt the shares of these banks from taxation under the general laws of the state taxing such shares.

M. BLAIR,
F. A. DICK,
Of Counsel for Defendants in Error.

APPENDIX.

An examination of the published statutes of Missouri shows the following acts of incorporation to have been passed, establishing moneyed institutions with banking privileges, excepting that of issuing their own notes for circulation.

Banks in Missouri.

February 16, 1847. Acts of 1847, p. 225, Boatmen's Saving Institution chartered. By amendment to the charter of Nov. 30, 1855 (Local Acts 1855, p. 148), which recites the original act, capital increased to $500,000, divided into shares of $100 each. Section 3 of this act gives it power to receive money on deposit and lend it, to "discount, buy, and sell promissory notes, bonds, bills of exchange, and other securities; to issue certificates of deposit, which shall be negotiable by endorsement and delivery; but nothing herein contained shall be construed to authorize the issue of any notes or other evidences of debt for circulation as money."

The deposits on 1st January, 1870, were $1,670,939, and its profits from July to December $87,981.

February 24, 1853. Acts 1853, p. 43. The German Savings Institution, with capital of $250,000, of shares $50 each. Section 8 grants unlimited banking powers, excepting issuing circulation.

On 1st January, 1870, its deposits were $1,349,548.

Local acts of 1855, p. 206. December 7, 1855, is charter of the "State Savings Institution," with capital of $1,500,000, with perpetual succession.

"Sec. 6. The institution hereby created shall have power to receive money on deposit and loan the same; to buy and sell drafts, bills of exchange, bonds, notes, and other instruments in writing; to allow interest on

money deposited; to transport from place to place gold dust, gold, and silver coin and bullion," &c.

Section 7 provides for directors to manage the corporation.

Section 15 makes the law a public act.

The deposits on 1st January, 1870, were $719,749.

Banks in Missouri.

Acts of 1851, p. 467, March 3, 1851, "Clay County Savingo Institution" incorporated.

Acts of 1853, p. 43, The German Savings Institution.

Acts of 1853, p. 46, The Mechanics' Saving Institution.

Acts of 1853, p. 315, The Mutual Savings Institution.

Acts of 1853, p. 317, The St. Louis Savings Institution.

Acts of 1853, p. 320, The Missouri Savings Institution.

Local acts of 1855, p. 163, The Independence Savings Institution, $200,000.

Idem, 166, St. Louis and Carondelet Savings Institution, $500,000.

Idem, 207, The State Savings Institution, $1,500,000.

Idem, 234, Western Savings Institution, $300,000.

Idem, 241, Mound City Savings Institution, $150,000.

Idem, pp. 225, 229, 250, 253, 120, 136, 282, total capital in acts of 1855, $2,650,000.

Banks incorporated in 1857.

See acts of 1857, as follows:

Page 251, St. Joseph Savings Institute, $1,000,000.
Id., 275, Jackson Saving Institution, $500,000 capital.
" 370, Kansas City Saving Institution, $500,000 "
" 403, Lexington Savings Institution, $500,000 "
" 428, Hannibal Saving Institution, $500,000 "
" 484, Platte " " $1,000,000 "
" 581, Citizens' " " 1,500,000 "
" 583, Laclede " " 1,000,000 "
" 595, First Ward " " 500,000 "
" 603, United States Saving " 1,500,000 "
" 607, Union " " 750,000 "
" 634, Loan and Savings " 500,000 "
" 642, People's " " 500,000 "
" 654, Franklin " " 500,000 "

Under act of Congress of the 30th of June, 1864, 13 Statutes, 277, all banks, &c., are required to make monthly returns of deposits to the United States assessor for taxation. From the published return to the U. S. assessor of 1st January, 1870, the following tables are compiled:

Deposits in Savings Banks above enumerated.

Boatmen's Saving Institution	$1,670,939 00
Same	87,981 00
Citizens' Saving Bank	317,059 00
Franklin Saving Inst.	405,269 00
German Savings Inst.	1,349,548 00
North St. Louis Saving Institution	469,204 00
People's " "	950,374 00
State Saving Inst.	719,749 00
Union Saving Inst.	201,000 00
U. S. " "	497,984 00
Western " "	199,817 00
Total deposits, January 1, 1870	$6,868,924 00

Deposits of Savings Banks, January 1, 1870, *not above enumerated.*

Accommodation Bank	$218,500 00
American "	40,700 00
Broadway Savings Bank	259,660 00
Butchers' and Drovers' Bank	643,435 00
Bank of Commerce	415,506 00
Bremen Savings Bank	123,432 00
Biddle Market Bank	285,751 00
Central Bank	1,324,479 00
Fourth Street Bank	59,008 00
Franklin Ave. "	245,915 00
German Bank	703,397 00
International Bank	95,333 00
Metropolitan "	40,175 00
Missouri Loan Bank	13,243 00
Provident Sav. Inst.	294,000 00
South Ward " "	322,400 00
Traders' Bank	202,526 00
	$5,277,460 00
	6,868,924 00

Total deposits of banks not of issue	$12,146,384 00
Total deposits of banks of issue	1,682,726 00
Of individual bankers	243,446 00
	$14,072,556 00

For the month of January the published official returns show the following additional banks, whose names were not included in the report for January:

Commercial Bank	$291,040 00
German *Bank*	760,098 00
Home Savings Bank	73,600 00
Lucas Bank	123,140 00
Metropolitan Bank	43,276 00
National Loan Bank (a state corporation)	806,892 00
Tenth Ward Savings Association	312,615 00
Union Savings and Loan Association	570,865 00
	$2,981,526 00
Above amount	12,146,384 00
Total deposits in state banks not of circulation	$15,127,910 00
Deposits in other banks	1,682,726 00
With private bankers	243,446 00
Total deposits	$17,054,082 00

The subjoined list of bank stocks in St. Louis was published in the financial article of the St. Louis papers in February, 1870:

Bank Stocks.

Name.	Am't paid in.	Par value.	Offered.	Asked.	Last dividend.
Accommodation ...	50	100	27	30	July, 1869, 2½ per cent.
American	20	100	10	11	
Bank Commerce ...	100	100	200	205	Non-declaring.
Biddle M'k t Sav...	20	100	36	.....	Jan., 1870. 5 p. c. 6 mos.
B'tman's S. In.....	100	100	575	580	Non-declaring.
Bremen Savings....	34	100	36	.....	Jan., '70, 2½ p. c 6 mos.
Broadway Savings.	11½	100	17	20	Jan., '70, 1½ p. c. 6 mos.
Butchers' and Dr...	30	100	55	56	Jan., '70, 1½ p. c. 6 mos.
Central Savings....	36½	50	58	60	June, '69, 15 p. c. 1 year.
Citizens' Sav. B'k	37½	100	42	.....	
Commercial.....	100	100	85	87	Jan., 1870, 5 p. c. 6 mos.
Exchange	100	100	102	103	Jan., 1870, 5 p. c. 6 mos.
1st National.....	100	100	125	130	Jan., 1870, 6 p c. 6 mos.
4th National	100	100	159	162	Nov., 1869. 6 p. c. 6 mos.
Fourth Street.....	54½	100	.....	40	4 per cent. July, 1868.
Franklin Sav In...	100	100	83	85	Jan , 1870, 5 p c. 6 mos.
Frank. Av. G. S. I.	30	100	32	35	Jan., 1870, 5 p c 6 mos.
German Sav. In ...	50	50	190	195	Feb., 1870, 5 p c. 6 mos.
German.....	16	100	30	35	Jan., 1870, 1½ p. c. 6 mos.
Home Savings.....	54¾	100	.....	.....	Jan., 1870. 1¾ p. c 6 mos.
International	40	1 0	40	44	Jan., 1870, 5 p. c. 5 mos.
Lucas Bank	100	100	100	.....	
Mechanics'	100	100	96	97	Jan., 1870, 4 p. c. 6 mos.
Merchants' Nat.....	100	100	80	82	Jan., 1870, 4 p. c. 6 mos.
Metropolitan	20	100	.....	10	
Missouri Loan.....	100	100	27½	40	
Nat. State, Mo.....	100	100	92½	93½	Jan., 1870, 5 p c 6 mos.
National Loan.....	100	100	120	130	May, 1867. 10 per cent.
N. St. L. Sav. In.	50	50	135	140	Aug., 1869. 10 p. c. 6 mos.
People's Sav. In....	50	50	60	.....	Jan , 1870. 5 p. c. 6 mos.
Provident S. Ass ..	100	100	98	100	Jan., 1870, 3 p c. 6 mos.
2d National.....	100	100	103	105	Jan., 1870, 6 p. c. 6 mos.
St. L. National.....	100	100	91	92	Jan., 1870. 5 p. c 6 mos.
State Sav Ass.....	50	50	63	65	Feb., 1870. 5 p. c. 6 mos.
10th W'd Sav Ass	100	100	130	150	Jan , 1870, 10 p. c. 6 mos.
3d National.....	100	100	94	96	Jan., 1870, 5 p. c 6 mos.
Traders'.....	100	100	80	82	Jan., 1870. 5 p. c. 6 mos.
Union National. ...	100	100	64	66	Jan., 1866. 3 p. c. 6 mos.
Union Sav. Ass.....	50	50	46	50	Jan., 1867, 6 p. c. 6 mos.
U. S. Sav. Ass.....	50	50	70	75	Jan., 1870, 5 p. c. 4 mos.

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German Sav. In ...	50	50	190	195	Feb., 1870, 5 p c. 6 mos.
German.....	16	100	30	35	Jan., 1870, 1½ p. c. 6 mos.
Home Savings.....	54¾	100	.....	.....	Jan., 1870. 1¾ p. c. 6 mos.
International	40	1 0	40	44	Jan., 1870, 5 p. c. 5 mos.
Lucas Bank	100	100	100	.....	
Mechanics'	100	100	96	97	Jan., 1870, 4 p. c. 6 mos.
Merchants' Nat.....	100	100	80	82	Jan., 1870, 4 p. c. 6 mos.
Metropolitan	20	100	.....	10	
Missouri Loan.....	100	100	27½	40	
Nat. State, Mo.....	100	100	92½	93½	Jan., 1870, 5 p c 6 mos.
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St. L. National.....	100	100	91	92	Jan., 1870. 5 p. c 6 mos.
State Sav Ass.....	50	50	63	65	Feb., 1870. 5 p. c. 6 mos.
10th W'd Sav Ass	100	100	130	150	Jan , 1870, 10 p. c. 6 mos.
3d National.....	100	100	94	96	Jan., 1870, 5 p. c 6 mos.
Traders'.....	100	100	80	82	Jan., 1870. 5 p. c. 6 mos.
Union National. ...	100	100	64	66	Jan., 1866. 3 p. c. 6 mos.
Union Sav. Ass.....	50	50	46	50	Jan., 1867, 6 p. c. 6 mos.
U. S. Sav. Ass.....	50	50	70	75	Jan., 1870, 5 p. c. 4 mos.

IN THE

Supreme Court of the United States.

No. 129.—December Term, 1869.

JOHN R. LIONBERGER, Plaintiff in Error,

vs.

EDWARD S. ROWSE.

In this cause it is agreed by the parties and made a part of this case and the record thereof as follows:

That the following clause was adopted as a part of the constitution of the State of Missouri on the 23d of January, 1857:

§ 1. Article 8 of the constitution of the State of Missouri, respecting banks, be, and the same is hereby, abolished, and the following substituted in lieu thereof:

"Article VIII. The general assembly shall have power to establish such bank or banks as may be deemed necessary for the interests of the state, but any bank so established shall be based upon a specie capital and made liable to redeem its issues in gold or silver: *Provided*, That the number of banks chartered shall never exceed *ten*, and the aggregate amount of capital shall never exceed twenty millions of dollars."

During the same session of the legislature which gave the final vote on adoption of this amendment the legislature carried out the power therein conferred by the passage of a law to charter and regulate ten banks. Article I. contained the general provisions of the law. Article IV. chartered all the ten banks.

Prior to the year 1857, and during that year and subsequent thereto, the legislature of Missouri had incorporated certain institutions with power to transact the business of banks of deposit and discount. A particular reference to the statutes incorporating them will show the powers specially conferred. A reference to such statutes, with the names and date of the charters, is hereto appended as a part of this statement; and also a statement showing the deposits of such of said banks as are situated in the city of St. Louis. (See this statement appended to the brief of the plaintiff in error.)

The first section of the banking law of 1857 provides as follows:

§ 1. Every bank which now is, or shall hereafter be, incorporated under the authority of this state shall be subject to the liabilities and governed by the rules contained in this act.

By section four of the same act it was provided:

§ 4. All banks established in pursuance of this act may issue bills and notes of the denomination of five, ten, twenty, fifty, one hundred, five hundred, and one thousand dollars, and no more.

By section thirty-two of said act it was further provided:

§ 32. In consideration of the privileges granted by this act to the banks incorporated in this state, each banking company agrees to pay to the state annually one per cent. on the amount of capital stock paid in by the stockholders, other than the state, which shall be in full of all bonus and taxes to be paid to the state by the respective banks, which amount when received by the treasurer shall be by him immediately placed to the credit of the "state interest fund," and it shall form permanently a part of said fund.

By the 12th section of the act of the Missouri Legislature, passed in 1861, amendatory of the general banking law of 1857, it was provided as follows:

§ 12. "The one per cent. required to be paid by section 33 (32) of article one of said act (act of 1857) shall be received as full compensation for all taxes of every kind whatever, and it shall not be lawful for any county, city or town corporation to buy or collect any tax of any kind upon, or from, any of the banks organized under said law."

Under the provisions of the general banking law of 1857 the ten banks chartered by it organized, and continued to do business as banks of discount, deposit, and circulation until the year 1863. During that year and subsequently, but before the assessment of the tax in this case, all of them except two, the "Exchange Bank" and the "Mechanics' Bank," organized as national banks, under the provisions of the acts of Congress relating thereto. The Third National Bank of St. Louis, of which the plaintiff in this case is a stockholder, was one of the banks which was so organized on the 25th of December, 1863; the others, except the Exchange Bank and the Mechanics' Bank, relinquished their state charters and organization as national banks, under the provisions of an act of the Legislature of the State of Missouri, approved Feb. 12, 1864.—(See Laws of 1863–64, p. 9.)

The Exchange Bank and the Mechanics' Bank retained their organization under the state law as banks of discount, deposit, and circulation, and still continue to hold their charters as such.

In the case before the court an *ad valorem* tax was assessed against the stock of the plaintiff as a stockholder in the Third National Bank of St. Louis, by the county assessor, for state and county purposes. The tax amounted to five hundred dollars, ($500,) and was made upon a valuation of the shares of stock so held by him, and the tax levied was $\frac{90}{100}$ per cent. for state purposes, $\frac{40}{100}$ per cent. for county purposes, and $\frac{40}{100}$ per cent. for school purposes.

The validity of this tax is the question at issue before the court.